

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP498-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2010CF208

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRIAN K. GOODSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Oconto County: JAY N. CONLEY, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Brian Goodson appeals a judgment sentencing him for armed robbery as a party to a crime. He also appeals an order denying his motion to modify the sentence based on the court's consideration of defunct

sentencing guidelines and the court's failure to notify the parties that it would consider those guidelines. Because we conclude the error, if any, was harmless beyond a reasonable doubt, we affirm the judgment and order.

¶2 Goodson entered a no-contest plea to the armed robbery charge. At the sentencing hearing, after considering the seriousness of the offense, the trauma to the victim, Goodson's character and the need to protect the public, the court indicated that it was required to "look at the sentencing guidelines that the State used to have that again have not been updated, but I'm still required to look at them." The court then noted the guidelines would recommend anywhere from five years' confinement to seventeen years' confinement, depending on risk factors about which reasonable people could differ. The court then imposed a sentence of ten years' initial confinement and ten years' extended supervision, consecutive to any other sentence Goodson was then serving.

¶3 At the postconviction hearing, the court conceded it erroneously believed it had to look at the guidelines and the parties could not have been aware that the court would consider them. However, the court also noted it considered the guidelines outdated and knew at the time of sentencing that it was not bound by the guidelines. The court noted its belief that the sentencing guidelines were "almost no help" because they would support a sentence anywhere from five years to seventeen years. The court indicated the primary reason for the sentence imposed was protection of the public and the sentence would have been the same had the court not considered the guidelines.

¶4 A sentencing court erroneously exercises its discretion when it imposes a sentence "based on or in actual reliance upon clearly irrelevant or improper factors." *State v. Harris*, 2010 WI 79, ¶30, 326 Wis.2d 685, 786

N.W.2d 409. The defendant must prove by clear and convincing evidence that the court actually relied on the irrelevant or improper factors. *Id.*, ¶¶30-35. If the defendant makes that showing, the burden shifts to the State to prove the error was harmless. Whether a defendant’s due process rights were violated by the court’s failure to give notice and an opportunity to be heard presents a question of law that this court reviews de novo. *State v. Vanmanivong*, 2003 WI 41, ¶17, 261 Wis. 2d 202, 661 N.W.2d 76.

¶5 Likewise, whether an error was harmless presents a question of law that we decide without deference to the circuit court. *See, e.g., State v. Carnemolla*, 229 Wis. 2d 648, 653, 600 N.W.2d 236 (Ct. App. 1999). An error is harmless if there is no reasonable probability of a different outcome, that is, a probability sufficient to undermine confidence in the outcome. *State v. Dyess*, 124 Wis. 2d 525, 543-45, 370 N.W.2d 222 (1985). To demonstrate an error is harmless, the State must prove beyond a reasonable doubt that the sentence would have been the same had the court not considered an improper factor. *See State v. Harrell*, 2008 WI App 37, ¶37, 308 Wis. 2d 166, 747 N.W.2d 770.

¶6 Any error in considering the defunct sentencing guidelines was harmless beyond a reasonable doubt because the record supports the trial court’s assertion that the defunct guidelines did not affect the length of the sentence. At sentencing, the court indicated the guidelines were not useful and were outdated. The record shows the court “looked at” the guidelines merely because it believed it was required. The court’s consideration of the guidelines does not mean the guidelines affected its sentencing decision. The court’s comments at the sentencing hearing demonstrate it believed the guidelines were meaningless. At the postconviction hearing, the court confirmed that the guidelines were “almost

no help” and did not affect the sentence imposed, noting that it would have imposed the same sentence without considering the guidelines.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-2012).

